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Due Process in Sentencing: A Right to Rebut the Presentence Report

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DUE PROCESS IN SENTENCING: A RIGHT TO REBUT THE PRESENTENCE REPORT?

*By Robert Andrew Harkness**

Introduction

Sentencing of a defendant is the point at which criminal guilt has been officially determined, either by a trial with all its constitutionally compelled safeguards or by formal admission of guilt,[1] and society decides what to do next with the criminal offender. At this stage of the criminal process, the sentencing court decides whether to release the convicted defendant outright on probation, incarcerate him in a penal institution with or without the possibility of parole, or divert him to a less restrictive rehabilitative program.[2] In addition, the sentencing court determines the duration of the dispositional alternative which best suits the particular needs of the individual defendant. In making these decisions, the court must consider the characteristics of the defendant upon whom sentence is to be imposed. Modern penological concepts of individualizing punishment require that the sentencing judge possess "the fullest information possible concerning the defendant's life and characteristics."[3]

In the federal courts, the sentencing judge relies heavily upon the presentence report to supply him with this information. The presentence report is prepared for the court by a probation officer pursuant to Rule 32 of the Federal Rules of Criminal Procedure.[4] It provides

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1. It should be noted that 80 to 90 percent of criminal cases are disposed of through guilty pleas, so that for the vast majority of criminal defendants the critical determination is of sentence, not guilt or innocence. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS, 9 (1967); 1966 DIRECTOR OF THE ADM. OFFICE OF THE U.S. COURTS, ANN. REP. 220. This pattern has remained virtually unchanged for years; similar figures were reported in Newman, *Pleading Guilty for Consideration: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956).

2. *See* Lehrich, *The Use and Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225 (1969) [hereinafter cited as Lehrich].

3. Williams v. New York, 337 U.S. 241, 247 (1949).

4. "(c) PRESENTENCE INVESTIGATION

. . . .

(2) Report. The report of the presentence investigation shall contain any prior criminal

the sentencing court with the information necessary for a reasoned choice between the potential dispositional alternatives.[5]

Whether a convicted criminal defendant has a right to learn what information forms the basis for his sentence and whether the defendant should be given an opportunity to assure the factual accuracy of that information has been long debated.[6] Constitutional issues arise when a criminal defendant is sentenced on the basis of false or inaccurate information or when the sentencing judge refuses to disclose to the convicted defendant what information constituted the basis for the sentence. Does fundamental fairness under the due process clauses of our Constitution require disclosure to the defendant of the informational basis of his sentence?

Former Rule 32 did not come to grips with these issues.[7] Effective December 1, 1975, proposed Rule 32(c)(3)(A)&(B) will provide:

> (3) Disclosure
>
> (A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

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record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court." FED. R. CRIM. P. 32, 18 U.S.C. App., Rules of Criminal Procedure for the United States District Courts, Rule 32 (1970).

5. The probation service recommends that certain information be included in every presentence report: the defendant's version of the offense, prior criminal record, family and mental history, home and leisure time activities, health, employment, military service, financial condition, evaluative summary and recommended disposition. DIVISION OF PROBATION, ADM. OFFICE OF THE U.S. COURTS, PUB. NO. 103, THE PRESENTENCE INVESTIGATION REPORT 9 (1965).

6. For an overview of the debate on this issue, see the sources listed in Buchea v. Sullivan, 497 P.2d 1169, 1171-72 n.7 (Ore. 1972); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 524 nn.49 & 50 (Supp. 1973) [hereinafter cited as 2 WRIGHT]; Note, *Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion*, 26 HASTINGS L.J. 1527, 1527 n.1 (1975); *see also* AMERICAN BAR ASSOCIATION STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 4.1-.6, commentary at 201-31 (approved draft 1968) [hereinafter cited as A.B.A. STANDARDS].

7. See notes 30, 37 & 43 *infra* and text accompanying.

> (B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.[8]

If disclosure is mandated under the new Rule 32 must the defendant also be afforded an opportunity to rebut what he feels to be incorrect or inaccurate information? Does the defendant have the right under the Fifth or Fourteenth Amendments to the Constitution to cross-examine those who have given information against him? Can he produce witnesses or introduce evidence in his own behalf at the sentencing proceeding? What protections does our Constitution extend to a criminal defendant after the issue of his guilt or innocence has been resolved?

Policy Considerations

The policy considerations for and against disclosure of the informational basis for a sentence are well-known and have been repeatedly asserted.[9] The clear trend among commentators and institutions considering this issue is in favor of disclosure.[10] The considerations motivating nondisclosure, such as fear that informational sources will dry up through embarrassment or revenge, sentencing proceedings will become unduly protracted, or rehabilitative efforts will be hampered by disclosure of the diagnostic portions of the presentence report, were

8. PUB. L. NO. 94-64, § 3, 89 Stat. 370 (1975), *amending* Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, 62 F.R.D. 271, 320-21 (1974) [hereinafter cited as Proposed Amendments].

9. *See* 2 J. MOORE, FEDERAL PRACTICE, RULES OF CRIMINAL PROCEDURE 8A, ¶ 32.03(4) (Supp. 1974); A.B.A. STANDARDS, *supra* note 6, at 216-24; Gray, *Post Trial Discovery: Disclosure of the Presentence Investigation Report*, 4 TOL. L. REV. 1, 2-4 (1972) [hereinafter cited as Gray]; Lehrich, *supra* note 2, at 238-46. *See also* United States v. Dockery, 447 F.2d 1178, 1186-1201 (D.C. Cir.) (Wright, J., dissenting), *cert. denied*, 404 U.S. 950 (1971).

10. *See, e.g.*, PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 145 (1967); A.B.A. STANDARDS, *supra* note 6; NAT'L COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT, § 4 (1963) & (1972) [hereinafter cited as MODEL SENTENCING ACT]; AMERICAN LAW INSTITUTE MODEL PENAL CODE, § 7.07(5) (preliminary draft 1962); Gray, *supra* note 9; Note, *Disclosure of Presentence Reports: A Constitutional Right to Rebut Adverse Information by Cross-Examination*, 3 RUTGERS-CAM. L.J. 111 (1971); Note, *The Presentence Report: An Empirical Study of its Use in the Federal Criminal Process*, 58 GEO. L.J. 451 (1970) [hereinafter cited as *Empirical Study*]; Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968) [hereinafter cited as *Judicial Sentencing*].

found unsupported by actual practice and insufficient, when weighed against the interests of both the defendant and society in having sentences based upon accurate information. Fairness to the defendant requires that he be informed of the facts upon which his sentence is based so that he may have a fair opportunity to ensure their accuracy.[11]

Confidentiality

One of the weightiest arguments against the disclosure of the presentence report to the convicted defendant is that such disclosure would violate the confidential relationship between the probation officer and his informants and make it more difficult to obtain needed information. Underlying this argument is the fear that a vengeful defendant will retaliate against the informant, and that without promise of confidentiality to the informant, this source of potentially useful information will "dry up."

Empirical evidence suggests that disclosure does not inevitably destroy confidentiality or result in serious loss of information to the sentencing court.[12] In a particular case, special circumstances might indicate a potential danger to an informant, but special protective procedures could permit disclosure without revealing the identity of the confidential informant.[13] If the information from a confidential informant is indeed crucial to the determination of sentence, its accuracy should be ensured by the traditional means of resolving issues of fact.

In discussing the importance of resolving factual issues, Chief Justice Warren has pointed out that:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has

11. *See* A.B.A. STANDARDS, *supra* note 6, at 219-20; Gray, *supra* note 9, at 5; Lehrich, *supra* note 2, at 238-46; *Empirical Study, supra* note 10, at 472.

12. *See* A.B.A. STANDARDS, *supra* note 6, at 219-20; Lehrich, *supra* note 2, at 239; *Empirical Study, supra* note 10, at 474; *Judicial Sentencing, supra* note 10, at 838-41.

13. *See* A.B.A. STANDARDS, *supra* note 6, at 217-18; *Empirical Study, supra* note 10, at 472; *Judicial Sentencing, supra* note 10, at 839.

> been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny.[14]

Surely it is only fair to apply these same procedures at sentencing to the resolution of factual issues. Sentencing involves the same potential problems in determining facts to be used as a basis for the selection of dispositional alternatives. Where these facts are in issue, it is vitally important to ensure their accuracy by utilizing the traditional methods for resolving issues of fact.

Delay

In *Williams v. New York*,[15] the United States Supreme Court first warned against the danger of protracted sentencing proceedings, arguing that the type and extent of sentencing "information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues."[16] The Court feared that the sentencing proceeding would be turned into a second trial, adding further strain to already limited judicial resources. However, since approximately eighty-five percent of all defendants in the federal criminal system plead guilty,[17] the sentencing proceeding provides the court with the only opportunity to learn the circumstances of the crime and the character of the defendant. Thus for the vast majority of criminal defendants the critical determination of factual issues takes place at sentencing and not at trial.

Defense counsel will rarely indulge in frivolous and time-consuming arguments at a sentencing proceeding. Since much of the information contained in the presentence report is readily verifiable, the defendant will be reluctant to antagonize the sentencing judge with nonmeritorious claims in his behalf, when the sentencing judge has virtually unreviewable discretion as to the type and length of sentence. In addition, any attempt by the defense attorney to engage in dilatory tactics by arguing irrelevant issues is subject to the court's traditional discretion to control its own proceedings by limiting argument on collateral issues.[18] Experience in jurisdictions allowing disclosure of the presentence report to the defendant indicates no untoward delay in sentencing proceedings.[19] Disclosure should in fact narrow the

14. Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

15. 337 U.S. 241 (1949).

16. *Id.* at 250.

17. See note 1 *supra.*

18. *See* Lehrich, *supra* note 2, at 239-40; *Empirical Study, supra* note 10, at 472-73; *Judicial Sentencing, supra* note 10, at 841.

19. *See* Advisory Committee Note to Proposed Amendments, *supra* note 8, at 325; Lehrich, *supra* note 2, at 239-40.

scope of inquiry at the sentencing proceeding by sharply delineating the real issues of fact at stake, thereby eliminating the need to discuss extraneous matters.

Rehabilitation

Opponents of disclosure also argue that the disclosure of the presentence report to the defendant will interfere with rehabilitation efforts. They contend revelation of the probation officer's candid diagnostic opinion of the defendant and his recommendation as to disposition might upset or destroy the close personal relationship between the probation officer and the defendant which is necessary to gain the cooperation of the defendant in a successful program of rehabilitation. However, the delicacy of this relationship is due to the probation officer's dual role as social worker and officer of the court during sentencing, and not to his role as counselor. Practically, case load burdens may limit the development of any intimate relationship between the probation officer and the defendant. If the relationship is substantially impaired by disclosure of the presentence report, a different probation officer may be assigned for the actual implementation of a rehabilitative program. In any case, the defendant always has a strong incentive to cooperate with the probation officer, since the probation officer has the power to recommend to the court a more restrictive disposition for the defendant. Probation officers usually recommend a disposition more lenient than that actually imposed by the court, so there is little likelihood that the relationship between probation officer and defendant will be disturbed in the great majority of cases. Any disadvantages of disclosure are outweighed by the value of having accurate factual information at the disposal of the sentencing judge when he is determining which dispositional alternative best fits the needs of both the defendant and society.[20]

Benefits of Disclosure

The chief benefit of disclosing the factual content of the presentence report to the defendant is that it will assure the accuracy of the information contained in the report. No matter how well motivated the probation officer is, he does not have the time or resources available to investigate comprehensively each defendant's case.[21] Under such circumstances, the probation officer cannot assure the accuracy of all the information in his report; often he must resort to second- and third-

20. *See Empirical Study, supra* note 10, at 473; *Judicial Sentencing, supra* note 10, at 840-41.

21. *See* Lehrich, *supra* note 2, at 241; *Judicial Sentencing, supra* note 10, at 837 n.82.

hand hearsay in order to get any information at all. By allowing the inspection of the presentence report, the defendant is able to call to the attention of the court any factual inaccuracies in the report. This will avoid the tragic consequence of a defendant serving an undeservedly severe sentence because of false information in a report which he neither saw nor had any opportunity to challenge.

A less compelling consideration, but nonetheless important, is that disclosure will also allow the defendant to participate in the judicial process of sentencing and enable him to understand the reasons for the court's disposition of his case. The defendant will be able to perceive that the sentencing decision is not arbitrary, but a reasoned judgment based on all the facts of the case. This will increase the fairness of the system because it will increase the appearance of fairness, and this could be a significant factor influencing the rehabilitation of the defendant.[22]

Constitutional Considerations

In addition to the policy considerations discussed above, important constitutional considerations militate for disclosure. The due process clauses of the Fifth and Fourteenth Amendments extend to convicted defendants the right not to be sentenced on the basis of materially false information as a requirement of fundamental fairness. In *Townsend v. Burke*,[23] the defendant pleaded guilty in state court to robbery and burglary charges. At sentencing the defendant was not represented by counsel. Before pronouncing sentence, the court recited to the defendant his prior criminal record, including two charges of which the defendant had been found not guilty. Speaking for the majority of the Supreme Court, Justice Jackson stated:

> It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.[24]

This approach was reaffirmed by the Court in *United States v. Tucker*.[25] The defendant has been convicted of armed bank robbery

22. *See* A.B.A. STANDARDS, *supra* note 6, at 224; *Empirical Study*, *supra* note 10, at 474.

23. 334 U.S. 736 (1948).

24. *Id.* at 741.

25. 404 U.S. 443 (1972). For purposes of sentencing the Supreme Court finds no difference between the due process clauses of the Fifth and Fourteenth Amendments. In *Tucker*, the Court applied the *Townsend* due process rule directly to the case at bar. *Id.* at 447.

after a jury trial in federal district court. At sentencing the court conducted an inquiry into the defendant's background and gave explicit attention to the three previous felony convictions which the defendant had acknowledged. Several years later it was conclusively determined in collateral proceedings that two of these convictions considered by the court were constitutionally invalid because the defendant had not been represented by counsel. The Court found that the sentence for armed robbery was founded, at least in part, upon those invalid convictions and that a sentence based upon such materially false information could not stand. The Court affirmed the appellate court's remand to the trial court for resentencing without consideration of any constitutionally invalid convictions.

A close reading of *Townsend* strongly suggests that it may well be the duty of defense counsel to assure that the sentence is based on accurate information. In *Townsend*, Justice Jackson noted:

> We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted.[26]

In *Kent v. United States*,[27] the court elaborated upon the duties of defense counsel in the context of a juvenile waiver hearing. In requiring disclosure of a juvenile's social records to his attorney before the waiver hearing, Justice Fortas made these observations about the defense attorney's role in ensuring the accuracy of information upon which the judge's decision is based:

> We do not agree with the Court of Appeals' statement, attempting to justify denial of access to these records, that counsel's role is limited to presenting "to the court anything on behalf of the child which might help the court in arriving at a decision; it is not to denigrate the staff's submissions and recommendations." On the contrary, if the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to "denigrate" such matter.[28]

How can the defendant's right to be sentenced on accurate information be assured if the defense has no knowledge of precisely what information is being considered or relied upon by the sentencing judge? In order to assure adequate representation by counsel and the accuracy of sentencing information, fundamental fairness to the accused mandates that the defense be fully informed of the facts upon which the sentence is based.

26. 334 U.S. at 740.
27. 383 U.S. 541 (1966).
28. *Id.* at 563.

Early Approach in the Federal Courts

The initial approach of the federal courts to these problems was decisively determined by the Supreme Court's decision in *Williams v. New York*[29] and the express language of Federal Rule of Criminal Procedure 32.[30] In *Williams*, the defendant was convicted of first degree murder by a jury in state court. The jury recommended a sentence of life imprisonment, but the judge, relying upon information that the defendant had engaged in a great number of serious crimes, as yet uncharged, imposed the sentence of death. This information had been furnished to the trial court during the course of the presentence investigation without affording the defendant any opportunity to confront or cross-examine witnesses supplying the information. Upon appeal the defendant argued that the sentence was imposed in violation of the Fourteenth Amendment because "the sentence of death was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal."[31] The Supreme Court, after pointing out that judges at common law and under the New York statutes[32] traditionally exercised wide discretion in utilizing sources and types of sentencing information, and expressing the fear that "most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination,"[33] refused to find a violation of due process under the Fourteenth Amendment.[34]

Until the adoption of Rule 32, there had been no uniform formalized procedure enabling the federal district courts to utilize the probation service which had been created in 1925 for the purpose of preparing presentence reports to aid the courts in sentencing. As a result, court practices varied widely and not all the courts were provided with relevant personal and background information necessary to a reasoned determination of sentence. Rule 32 met this problem by requiring a presentence report on every defendant unless the sentencing

29. 337 U.S. 241 (1949). This approach was reaffirmed in Williams v. Oklahoma, 358 U.S. 576 (1959).

30. FED. R. CRIM. P. 32, 18 U.S.C. App., Rules of Criminal Procedure for the United States District Courts, Rule 32 (1952).

31. 337 U.S. at 243.

32. *Id.* at 245-46.

33. *Id.* at 250.

34. *Id.* at 250-52. Despite the broad language used by the Supreme Court in *Williams v. New York*, the trial judge did disclose to the defendant the information upon which the sentence was based and the accuracy of the information was not challenged by the defendant or his attorney. *Id.* at 244. Thus *Williams v. New York* may be seen essentially as a case of waiver.

court directed otherwise.[35] When first adopted by the Supreme Court in 1946,[36] Rule 32 was silent as to disclosure of the presentence report to the defendant.[37] Relying upon *Williams* and the failure of Rule 32 to expressly provide for dislosure, the federal courts refused the convicted defendant any right to inspect the presentence report or to rebut or contradict any information contained in it.

In *Hoover v. United States.*[38] the defendant pleaded guilty in federal district court to two counts of transporting stolen automobiles. The defendant was then sentenced to imprisonment for a period of five years on the first count and to three years on the second, the sentences to run consecutively. The defendant challenged the imposition of these sentences on the grounds that the presentence report contained many inaccurate, untrue, and prejudicial statements, and the failure of the court to allow him to rebut these statements amounted to a denial of due process. Citing the language of Rule 32 and *Williams,* the appellate court upheld the sentencing judge without mentioning any constitutional issues which might arise under *Townsend.*[39] In *United States v. Durham,*[40] the defendant moved for an opportunity to inspect the probation officer's report of the presentence investigation before sentencing. Relying upon *Williams* and expressing the fear that if these reports were made available to counsel as a matter of right, information generally contained in them would become unavailable, the district court denied the defendant's motion. The defendant appealed the decision to the Supreme Court, but the Court refused to review it.

In 1966 the Supreme Court, over the strong dissent of Justice Douglas,[41] amended Rule 32, explicitly sanctioning discretionary dis-

35. *Empirical Study, supra* note 10, at 454-55 and sources cited therein.

36. The Supreme Court is authorized to promulgate general rules of criminal procedure pursuant to 18 U.S.C. §§ 3771-72. These rules cover pretrial and post-trial matters and procedures, as well as the criminal trial itself. The Supreme Court must report the rules to Congress after the beginning of a regular session but not later than May 1. The changes become effective ninety days after being reported and nullify all laws in conflict with them unless Congress provides otherwise.

37. For a detailed history of Rule 32(c) and the strong judicial opposition to mandatory disclosure, *see* 2 WRIGHT, *supra* note 6, § 524.

38. 268 F.2d 787 (10th Cir. 1959). In Powers v. United States, 325 F.2d 666 (1st Cir. 1963), the court took the same approach to the disclosure of a Bureau of Prisons presentence report prepared pursuant to 18 U.S.C. § 4208.

39. Hoover v. United States, 268 F.2d 787, 790 (10th Cir. 1959).

40. 181 F. Supp. 503, 504 (D.D.C.), *cert. denied,* 364 U.S. 854 (1960).

41. "The proposed amendment to Rule 32(c)(2) states that the trial judge 'may' disclose to the defendant or his counsel the contents of a presentence report on which he is relying in fixing sentence. The imposition of sentence is of critical importance to a man convicted of crime. Trial judges need presentence reports so that they may have at their disposal the fullest possible information. See *Williams v. New York,* 337 U.S. 241. But while the formal rules of evidence do not apply to restrict the factors which the

closure.[42] Rule 32 then provided:

> The court before imposing sentence *may* disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon.[43]

Continuing to rely upon the broad discretion seemingly approved by the Supreme Court in *Williams* and embracing this express language of Rule 32 in its amended form,[44] the federal courts held without discussing the applicability to *Townsend*, that disclosure of the presentence report to the defendant was within the discretion of the trial court and that the defendant had no right to inspect it or rebut any adverse information it contained.[45]

The only concession to *Townsend*[46] was made in *Baker v. United*

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sentencing judge may consider, fairness would, in my opinion, require that the defendant be advised of the facts—perhaps very damaging to him—on which the judge intends to rely. The presentence report may be inaccurate, a flaw which may be of constitutional dimension. Cf. *Townsend v. Burke*, 334 U.S. 736. It may exaggerate the gravity of the defendant's prior offenses. The investigator may have made an incomplete investigation. See Tappan, Crime, Justice, and Correction 556 (1960). There may be countervailing factors not disclosed by the probation report. In many areas we can rely on the sound exercise of discretion by the trial judge; but how can a judge know whether or not the presentence report calls for a reply by the defendant? Its faults may not appear on the face of the document.

"Some States require full disclosure of the report to the defense. The proposed Model Penal Code takes the middle ground and requires the sentencing judge to disclose to the defense the factual contents of the report so that there is an opportunity to reply. Whatever should be the rule for the federal courts, it ought not to be one which permits a judge to impose sentence on the basis of information of which the defendant may be unaware and to which he has not been afforded an opportunity to reply." 383 U.S. 1089, 1092-93, 39 F.R.D. 276, 278-79 (1966) (Justice Douglas' dissent to amended FED. R. CRIM. P. 32) (footnotes omitted).

42. *See* Banister v. United States, 379 F.2d 750, 754 (5th Cir. 1967), *cert. denied*, 390 U.S. 927 (1968).

43. FED. R. CRIM. P. 32, 18 U.S.C. App., Rules of Criminal Procedure for the United States District Courts, Rule 32 (1970) (emphasis added).

44. See note 36 *supra*.

45. *See, e.g.*, United States v. Gross, 416 F.2d 1205, 1214 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970); Thompson v. United States, 381 F.2d 664, 666-67 (10th Cir. 1967); Roeth v. United States, 380 F.2d 755, 757 (5th Cir. 1967), *cert. denied*, 390 U.S. 1015 (1968).

46. Though not completely ignored, the basis for review under *Townsend* remained unclear. For example, in United States v. Weiner, 376 F.2d 42, 43 (1967), the appellate court found that there were no erroneous assumptions of fact or careless or designed pronouncement of sentence on a false foundation as in *Townsend*, but did not indicate how it came to this conclusion. Since mistaken information will rarely be apparent from the face of the record, how did the appellate court make its finding that there were no errors? Did the defendant so admit? Did the appellate court make its own investigation? Or was an evidentiary hearing on this issue held on the appellate level? *See also* United States v. Dace, 502 F.2d 897, 900-01, 908 (8th Cir. 1974).

States,[47] where the Fourth Circuit Court of Appeals held that the convicted defendant had a right to be apprised of:

> at least such pivotal matters of public record as the convictions and charges of crime, with date and place, attributed to him in the [presentence] report.
>
> . . . .
>
> The defendant should then be given an opportunity to refute or explain any record disparagement of his earlier deportment.[48]

In *Baker*, the defendant pleaded guilty to armed bank robbery. The trial court refused to disclose the probation officer's presentence report to the defendant before sentencing. Although the defendant had never been convicted of any crime, the court felt that prior charges against him had been withdrawn because the defendant's father had paid off the complaining parties. The judge then sentenced the defendant to fourteen years imprisonment. Following his commitment, the defendant wrote to the judge, asserting his innocence of any earlier wrongdoing and denying that anyone had ever paid anything to save him from criminal prosecution. Later, his attorney obtained partial access to the part of the presentence report listing six criminal charges against the defendant, including one which asserted that he had been accused of cheating and swindling in Georgia in 1959 and that $27,000 had been advanced by members of his family over a period of five years to avoid prosecution. The defendant filed affidavits in district court denying these charges and moved to vacate sentence. The district court refused on the grounds that the court was under no duty to disclose any portion of the report to the defendant and that the court had only considered other criminal charges and not convictions against the defendant. Under the compulsion of *Townsend*, the appellate court reversed and remanded for resentencing. However, the appellate court felt that neither *Townsend* nor *Kent* compelled complete disclosure of the presentence report, fearing that this would lead to the loss of valuable information to the sentencing court:

> No conviction or criminal charge should be included in the report, or considered by the court, unless referable to an official record. Of course, the defendant's general conduct and behavior, as well as his reputation in the community in regard to honesty, rectitude and fulfillment of his civic and domestic responsibilities, may be treated in the report. Whether any of such commentary should be released will remain in the discretion of the District Judge. Names of informants, as well as intimate observations readily traceable by the defendant, ordinarily should be withheld lest, to repeat, disclosure cut off the investigator from access to knowledge highly valuable to the sentencing court. It is to be

47. 388 F.2d 931 (4th Cir. 1968).
48. *Id.* at 933.

expected of the judge, however, that he winnow substance from gossip.[49]

The appellate court did not delineate the procedure by which the defendant could refute or explain derogatory information, nor did the court comment on whether or not the defendant would enjoy the right to confront witnesses furnishing the court with such information or the right to produce witnesses in his own behalf. The defendant still had no right to view the entire presentence report or to know or rebut all adverse information being considered against him by the court. Thus, while the defendant had a right to limited disclosure of matters of public record, such as convictions and criminal charges being considered against him, the rights guaranteed him by due process in a hearing to challenge that information remained unclear.

Judicial Reform

Disclosure

The first tentative step toward reform was taken by the Ninth Circuit Court of Appeals in *United States v. Weston.*[50] The defendant had been convicted of receiving, concealing and facilitating the transportation of illegally imported heroin. The trial judge initially indicated that the minimum mandatory sentence of five years would be appropriate, but acceded to the prosecutor's request that he consider a presentence report alleging that the defendant was one of the largest narcotics dealers in the area and travelled periodically to Mexico. These allegations were based upon a statement to the probation officer by narcotics agents of the Federal Bureau of Narcotics and Dangerous Drugs. The defendant, when informed by the court of these serious allegations at the sentencing hearing, vehemently denied such allegations and proclaimed her innocence. The court gave the defense an opportunity to rebut these allegations with factual information, thus placing on the defendant the burden of disproving the allegations of the presentence report. The trial court indicated that if the defendant could not disprove these allegations, it would treat them as true and consider them against her when determining her sentence. The defendant's counsel declined to attempt to rebut the allegations, asserting that they were without factual basis and that he could not conceive of what kind of investigation he could make to disprove a statement by an undisclosed informant that his client was a large-scale heroin dealer. The trial court on its own motion directed the prosecutor to submit factual material to support the conclusion set forth in the presentence report in an in camera hearing. The defendant and her counsel were excluded from

49. *Id.* at 934.

50. 448 F.2d 626 (9th Cir. 1971), *cert. denied,* 404 U.S. 1061 (1972).

the hearing in which the prosecutor submitted the confidential report. The trial judge held that the conclusions of the presentence report were substantiated and then imposed the maximum permissible sentence of twenty years.[51]

Upon appeal, the confidential report was forwarded under seal to the appellate court. It consisted solely of an unsworn memorandum from a federal agent to his superior. In the memorandum the agent merely quoted a named informant to the effect that the defendant was about to make a trip to Mexico and was distributing quantities of heroin to another individual for delivery to customers. No further concrete information was given in the confidential report to corroborate the broad charges of the presentence report, nor did the agent's memorandum contain anything to show that the informant was reliable. The appellate court was aghast that the defendant had been sentenced on the basis of such inherently unreliable information. The palpable unfairness of such a sentencing procedure was exceedingly clear to the court:

> In essence, then, what we have is a conviction at a trial providing all of the safeguards required by the Constitution, of an offense warranting, in the opinion of the trial judge, the minimum sentence of five years. This is followed by a determination, based on unsworn evidence detailing otherwise unverified statements of a faceless informer that would not even support a search warrant or an arrest, and without any of the constitutional safeguards, that [the defendant] is probably guilty of additional and far more serious crimes, for which she is then given an additional sentence of fifteen years. . . . To us, there is something radically wrong with a system of justice that can produce such a result.[52]

After further reviewing the shortcomings of the confidential report, the appellate court concluded:

> This will not do. It is tantamount to saying that once a defendant has been convicted of offense A, narcotics agents can say to the probation officer, and the probation officer can say to the judge, "We think that she is guilty of much more serious offense B, although all we have to go on is an informer's report," and the judge can then say to the defendant, "You say it isn't so; prove that to me!" In addition to the difficulty of "proving a negative," we think it a great miscarriage of justice to expect [the defendant] or her attorney to assume the burden and expense of proving to the court that she is not the large scale dealer that the anonymous informant says that she is.
>
> In Townsend v. Burke . . . the Supreme Court made it clear that a sentence cannot be predicated on false information. We extend it but little in holding that a sentence cannot be predicated on information of so little value as that here involved. A rational

51. *Id.* at 627-30.

52. *Id.* at 630-31 (citations omitted).

> penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process.[53]

Thus, *Weston* appears to have been founded upon the proposition that the imposition of sentence on the basis of such potentially inaccurate information was an abuse of due process.[54] However, *Weston* did not decide whether a convicted defendant had a right to disclosure of information contained in the presentence report, since the trial court had exercised its discretion under Rule 32 and voluntarily disclosed to the defendant the substance of the allegations made in the presentence report.

The next step in the direction of full disclosure was taken by the First Circuit Court of Appeals in *United States v. Picard*,[55] where, although the defendant's attorney was allowed to see the presentence report, the trial judge did not permit him to disclose its contents or discuss it in any way with his client. The trial court acknowledged that the report contained hearsay statements and that it did not consider all of the report as true. Nevertheless, in order to protect some of the report's sources of information and avoid prolonging the sentencing proceeding, the court imposed sentence upon the defendant without giving him an opportunity to inspect the report or rebut any adverse information in it. Relying upon *Townsend, Tucker* and *Weston*, the appellate court reversed, holding that subject to certain limitations, "the substance of a presentence report, to the extent it is relied upon, should be made known to the defendant."[56] The court continued:

> On resentencing, the court should either identify for the record and disavow information not relied upon or disclose to the defendant and his counsel as much of the report as is consistent with its desire to protect either the defendant (e.g., diagnostic information may be withheld to the extent that its disclosure might impede rehabilitative efforts) or others. One method of accomplishing this sensitive task would be for the court to excerpt from the report any possibly prejudicial diagnostic evaluations and any statements which may expose a vulnerable source to identification by the defendant. Any material so excerpted should then be summarized orally in open court, insofar as this can be accomplished in a manner which removes the possibility of prejudice to rehabilitative efforts or of identification of vulnerable sources.[57]

Thus, subject to necessary limitations to protect sources of information and rehabilitative efforts, under *Picard* the defendant has the due

53. *Id.* at 634.

54. *See* Note, *Criminal Procedure—Probable Cause and Due Process at Sentencing*, 50 N.C.L. REV. 925, 932-33 (1972); Note, *Criminal Law—Presentence Reports—Allegations of Prior Criminal Activity—Factual Determination—Degree and Burden of Proof*, 33 OHIO ST. L.J. 960, 961 (1972).

55. 464 F.2d 215 (1st Cir. 1972).

56. *Id.* at 220.

57. *Id.* at 220-21.

process right to inspect the presentence report or to be apprised in open court of the substance of any material excerpted from it. However, the court did not indicate how the defendant could challenge the report or any adverse information in it which the defendant felt to be false or inaccurate.

The Tenth Circuit Court of Appeals refused to go quite that far in *Johnson v. United States*[58] and *United States v. Green*[59] and did not recognize the right of a defendant to view the presentence report. In *Johnson*, the defendant pleaded guilty to falsely endorsing four United States Treasury checks. Subsequently, a presentence investigation was conducted, a report was furnished and the defendant was sentenced to concurrent terms of imprisonment for four years. In *Green*, the defendant was convicted of violating the Dyer Act, and sentenced pursuant to the Indeterminate Sentencing Act[60] to a maximum of four years. In both *Johnson* and *Green*, the defendants challenged the validity of their sentences on the ground that they had not been allowed to see their presentence reports. While holding that *Tucker* did not require that the defendant have access to the presentence report, the appellate court in each case did recognize that the trial court was required to disclose to the defendant that information in the report which the court is taking into consideration in pronouncing sentence.[61] Thus in *Johnson* there was no error where the trial court communicated to the defendant the information contained in the presentence report.[62] In *Green*, the appellate court was unable to perceive any abuse of discretion in the trial court's refusal to furnish the defendant personally with a copy of the presentence report where the report had been submitted to the defendant's attorney prior to sentencing.[63] In neither *Johnson* nor *Green* did the appellate court discuss what procedure would be applicable if a defendant wished to challenge any information upon which his sentence was based. The *Green* court's rationale was that nondisclosure of the presentence report protects the flow of facts concerning the defendant, which by encouraging a broad scope of knowledge insures intelligent and effective sentencing.[64]

This approach was followed by the Seventh Circuit Court of Appeals in *United States v. Gorden*[65] and *United States v. Miller*.[66]

58. 485 F.2d 240 (10th Cir. 1973).

59. 483 F.2d 469 (10th Cir.), *cert. denied*, 414 U.S. 1071 (1973).

60. 18 U.S.C. § 4208(a)(2) (1970).

61. Johnson v. United States, 485 F.2d at 242; United States v. Green, 483 F.2d at 470, 471.

62. 485 F.2d at 242.

63. 483 F.2d at 470.

64. *Id.*

65. 495 F.2d 308 (7th Cir.), *cert. denied*, 419 U.S. 833 (1974).

66. 495 F.2d 362 (7th Cir. 1974).

In *Gorden* no abuse of discretion was found where the trial court disclosed the general nature of the matters in the presentence report on which it relied in fixing sentence and afforded the defendant an "adequate opportunity" to rebut the factors which determined his sentence.[67] In *Miller* the trial court refused to reveal any portion of the presentence report other than the defendant's prior record. In reversing and remanding for resentencing, the appellate court held that while the presentence report need not be made available to counsel or made a part of the record, fairness to the defendant requires that the trial court disclose any grounds in the presentence report motivating its imposition of sentence. The court further elaborated:

> [I]f the judge regards any information in the presentence report as sufficiently important to affect the sentence, the substance of that information should be disclosed to the defendant or his counsel before sentence is pronounced. If the trial judge denies a motion seeking access to a presentence report, he should henceforth make it clear that his sentence determination is not predicated on the contents of the report or describe the substance of any matter he considers significant. This will avoid the kind of error exemplified by Townsend v. Burke.[68]

The court also gave some indication of what constitutes an adequate opportunity to rebut derogatory information contained in the presentence report:

> Although the district judge in these cases feared that disclosure would lead to lengthy trial-type proceedings at the sentencing stage, this opinion does not modify his power to limit the evidence taken on collateral issues. In its notes to its 1970 draft of proposed rule amendments, the Advisory Committee reported: "Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete presentence reports or the argument that sentencing procedures will become unnecessarily protracted."[69]

Thus a defendant challenging the informational basis of his sentence seems to have a right to submit evidence upon that issue, though the precise parameters of rebuttal remain unclear as does the defendant's right to cross-examine those witnesses who have supplied the court with adverse information.

The Opportunity to Rebut

In a series of recent cases, the Fifth Circuit Court of Appeals has come to the view that fundamental fairness requires that the defendant have the right to be apprised of the nature of the information relied

67. 495 F.2d at 310.
68. 495 F.2d at 364-65 (citations omitted).
69. *Id.* at 365.

upon by the trial court in assessing sentence and a right to rebut such information. In *United States v. Battaglia*,[70] the trial judge explicitly informed the defendant that he was relying upon certain facts in imposing sentence. In a petition to modify sentence the defendant contended that these facts were untrue. In considering the motion, the judge said that he would have imposed the same sentence if the facts were untrue. The appellate court reversed, commenting:

> Although this may be so, we think it is better to assure the defendant that the alleged untrue facts will not affect his sentence by permitting him a hearing at which he may seek to remove any lingering doubt the court may have had about the true situation. The court should then reconsider the sentence in the light of the true facts as found after hearing.[71]

Next, in *United States v. Espinoza*,[72] the trial court in sentencing explicitly relied upon the fact that the defendant had a history of making threats and assaults even though he had never actually been convicted. After sentence had been pronounced, the defendant filed a petition for reduction of sentence in which he requested an opportunity to present evidence to rebut the history of making threats and assaults upon which the court relied. The trial court denied the defendant's request without explanation. Relying upon the due process arguments of *Townsend, Tucker* and *Weston*, the appellate court held that where a sentencing judge explicitly relies on certain information in assessing a sentence, fundamental fairness requires that a defendant be given at least some opportunity to rebut that information.[73] The appellate court indicated that the extent of a defendant's right to rebut was subject to the discretion of the sentencing court.[74] It must be noted that the appellate court did not consider the issue of disclosure of the presentence report, and at the time of the *Espinoza* decision the Fifth Circuit rule was that disclosure was within the discretion of the trial court.[75] The Fifth Circuit Court of Appeals resolved this apparent inconsistency in favor of disclosure in *Shelton v. United States*.[76] Reasoning that since the defendant has the initial burden of showing that the court relied upon misinformation, the court held that the defendant must be advised of the nature of the information in order to have the rebuttal opportunity granted by *Espinoza*.[77]

70. 478 F.2d 854 (5th Cir. 1972).

71. *Id.* at 854.

72. 481 F.2d 553 (5th Cir. 1973).

73. *Id.* at 555-58.

74. *Id.* at 557.

75. *See, e.g.*, United States v. Frontero, 452 F.2d 406 (5th Cir. 1971); United States v. Lloyd, 425 F.2d 711 (5th Cir. 1970). In *Espinoza* the appellate court itself pointed out this anomaly. 481 F.2d at 555, 558.

76. 497 F.2d 156 (5th Cir. 1974).

77. *Id.* at 160.

Similarly relying upon *Townsend, Tucker* and *Weston,* both the Fourth and the Sixth Circuits have also concluded that due process requires a defendant be afforded the opportunity to rebut derogatory information relied upon by the sentencing judge. In *United States v. Powell,*[78] the defendant, along with his two brothers, had been convicted in separate trials of receiving and concealing stolen motor vehicles which moved in interstate commerce. At the sentencing hearing, the defendant's attorney informed the court that he believed that the presentence report contained information from the Federal Bureau of Investigation that the defendant was the mastermind of an auto theft ring, and that such prejudicial information was not supported by any facts. The district court judge denied the defendant's request to see the presentence report. Immediately before sentencing, the judge indicated there was no doubt in his mind that the defendant was the ringleader. The judge stated that he was basing this judgment on what he had heard at trial and disclaimed reliance upon the presentence report. Without further delay he sentenced the defendant to prison terms twice as long as that imposed on another brother who had been convicted of more counts than the defendant. Upon appeal, the Fourth Circuit Court of Appeals failed to find any evidence in the record of the defendant's trial, or in the trials of the defendant's mother or brother, establishing that the defendant was the ring leader. Relying upon the due process rule of *Townsend,* the appellate court found a denial of due process in the trial court's imposition of sentence without reopening the proceedings to allow the defendant an opportunity to explain or deny these charges.

In *Collins v. Buchkoe*[79] the defendant was convicted of rape in a nonjury trial and sentenced to life imprisonment. In imposing sentence the district court judge relied upon information in the presentence report that the defendant had raped another victim. The defendant was not afforded an opportunity to confront or cross-examine the alleged victim who had furnished this extremely damaging information to the probation officer. Grounding its decision on the conceptions of due process expounded in *Townsend, Tucker* and *Weston,* the Sixth Circuit Court of Appeals recognized that due process limitations require the defendant be given an opportunity to rebut sentencing information and remanded the case to the district court for a resolution of the truth or falsity of the presentence report accusations.

To date, the most extensive judicial discussion of the nature of the rebuttal procedure has been by the Second Circuit Court of Appeals

78. 487 F.2d 325 (4th Cir. 1973). *Cf.* United States v. Looney, 501 F.2d 1039 (4th Cir. 1974).

79. 493 F.2d 343 (6th Cir. 1974).

in *United States v. Rosner*.[80] In *Rosner*, the trial court possessed a sixteen page closely typed memorandum from the United States Attorney's office accusing the defendant of "possible misrepresentations, fraudulent conduct, lying and unethical behavior,"[81] for over two months. However, the court did not disclose this memorandum to defendant's counsel until the morning of actual sentencing. The court denied defense counsel's request for an adjournment despite the fact that counsel did not have any time to review or even absorb the many new charges against the defendant. Finding that defense counsel was not given an adequate opportunity to correct any possible misinformation in the prosecutor's memorandum, the appellate court vacated the sentence and remanded for resentencing. The appellate court ordered:

> In resentencing, the judge redrawn will either not consider the prosecutor's report, or if he deems it desirable to read it, will afford a reasonable opportunity, in advance of sentencing, to defense counsel to attempt to refute its accusations. We do not, however, order an evidentiary hearing.[82]

The *Rosner* court felt that the defendant should have been afforded ". . . 'an opportunity to answer or explain' . . . by means short of an evidentiary hearing but not in 'a niggardly fashion.' "[83] Thus while *Rosner* holds that a defendant must have a reasonable opportunity to refute, including adequate time in advance of sentencing to prepare, the exact nature of the rebuttal hearing and the type and extent of evidence to be introduced is left to the discretion of the trial court. Also left unclear is whether or not the defendant will enjoy the right to confront and cross-examine those who have supplied the court with adverse information. This approach is unsatisfactory, because if there are issues of fact which critically affect the disposition of the defendant's life, fairness to him dictates that these issues be decided by the traditional means thought necessary to attain accuracy.[84]

Federal Rules of Criminal Procedure Act of 1975

On April 22, 1974, under the provisions of 18 U.S.C. sections 3771 and 3772, the chief justice of the United States Supreme Court submitted to Congress a series of proposed amendments to the Federal Rules of Criminal Procedure.[85] As proposed by the Supreme Court, Rule 32(c)(3) would have provided:

80. 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

81. *Id.* at 1229.

82. *Id.* at 1231.

83. *Id.* at 1230 (citations omitted).

84. *Cf.* Greene v. McElroy, 360 U.S. 474 (1959).

85. For a discussion of the merits of the version of Rule 32 proposed by the United States Supreme Court regarding disclosure, *see* Note, *Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion*, 26 HASTINGS L.J. 1527 (1975).

(3) Disclosure.

(A) Before imposing sentence, the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence unless in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon.[86]

After the proposed amendments to the Federal Rules of Criminal Procedure were submitted, Congress delayed their implementation until August 1, 1975.[87] The apparent reason for the delay was to give Congress time to evaluate these controversial proposals.[88] At the hearings on the proposed amended rules, the proponents of disclosure included judges, law professors and public defenders, speaking on behalf of such prestigious organizations as the Judicial Conference of the United States, the American Civil Liberties Union, the Center for Law and Social Policy, the American Bar Association, the National Council of Criminal Defense Lawyers, and the National Legal Aid and Defender Association.[89] However, strong opposition to mandatory disclosure was expressed by prosecutors and trial judges.[90]

On the critical question of rebuttal of information contained in the presentence investigation report, the judges representing the Judicial Conference of the United States favored leaving the procedure to the discretion of the trial judge.[91] Some congressmen feared that a mandatory

86. Proposed Amendments, *supra* note 8, at 320-21.

87. PUB. L. No. 93-361, 88 Stat. 397 (1974). The proposed amended rules would have gone into effect on August 1, 1974.

88. *See* S. REP. No. 1023, 93d Cong., 2d Sess. 1-6 (1974); H. REP. No. 1144, 93d Cong., 2d Sess. 1-2 (1974).

89. *See generally Hearings on Amendments to Federal Rules of Criminal Procedure before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess., ser. 61 (1974) [hereinafter cited as *1974 Hearings*]; *Hearings on Proposed Amendments to Federal Rules of Criminal Procedure before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., ser. 6 (1975) [hereinafter cited as *1975 Hearings*].

90. *1974 Hearings, supra* note 89, at 138-39; *1975 Hearings, supra* note 89, at 244, 260, 288, 294.

91. *1975 Hearings, supra* note 89, at 204-05, 216-17, 219.

evidentiary hearing at sentencing would lead to delay and obstruction of the administration of justice.[92] Professor Leon Friedman, speaking for the American Civil Liberties Union, argued in favor of a mandatory evidentiary hearing for factual disputes relating to the presentence report.[93] However, he abandoned this position and urged leaving the submission of evidence to the trial judge's discretion,[94] and later even submitted a written proposal to that effect.[95]

As a result of this judicial, congressional and academic opposition to mandatory evidentiary hearings, Congress enacted the Federal Rules of Criminal Procedure Amendments Act of 1975. Rule 32(c)(3)(A) of the Act provides that upon disclosure of the presentence report:

> the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.[96]

However, proposed Rule 32(c)(3)(B) was not amended by Congress, and became law as originally submitted by the Supreme Court. As a result when the trial court summarizes the factual information contained in the presentence report, rather than disclosing it, there is no provision, discretionary or otherwise, for the submission of evidence on controverted facts in the presentence report.[97]

Amended Rule 32 would go far in extending to convicted defendants the right to disclosure of the informational basis for their sentence. Before imposing sentence, the trial court must permit the defendant or his counsel to read the presentence report, or, if any information is excerpted, the trial court must summarize orally or in writing the factual information contained in the report upon which the court relies in determining sentence. Thus, amended Rule 32 closely follows the liberal disclosure rule first announced by the First Circuit in *Picard*,[98] preserving the same safeguards against disclosure of informational sources and diagnostic portions of the presentence report, rather than adopting the seemingly more restrictive approach of the Seventh Cir-

92. *Id.* at 27, 173, 175.

93. *Id.* at 3-4, 15-16.

94. *Id.* at 16.

95. *Id.* at 31. Professor Friedman proposed the following amendment: Rule 32(c)(3)(A): Add at the end of the paragraph: . . . or, at the reasonable discretion of the court, to introduce testimony or evidence relating to any alleged factual inaccuracy contained in the presentence report. There is a striking similarity between Professor Friedman's proposal and the final form in which Rule 32(c)(2)(A) was finally adopted by Congress. See note 96 *infra*.

96. PUB. L. No. 94-64, § 3(33), 89 Stat. 370 (1975).

97. See note 86 *supra* and text accompanying.

98. 464 F.2d at 220-21.

cuit in *Gorden*,[99] which only required the disclosure of the general nature of matters in the presentence report.

Inadequacies of Amended Rule 32

While amended Rule 32(c)(3)(A) would permit the defendant to discover the factual basis of his sentence in most instances, it does not provide for disclosure sufficiently in advance of sentencing to afford defense counsel adequate time to prepare for the sentencing hearing. More importantly, it fails to establish for the defendant any means to ensure the accuracy of sentencing information, leaving the introduction of testimony or other information on controverted factual issues to the discretion of the court. Rule 32 does not delineate the procedure to be used when the defendant challenges a fact in the presentence report, nor does it allow a defendant the right to present witnesses in his own behalf or confront and cross-examine those who have furnished the court with adverse information in the presentence report.[100] In addition, where Rule 32(c)(3)(B) provides for a factual summary when information in the presentence report is withheld, there is no provision for even discretionary submission of evidence by the defendant.

The Need for an Adversary Hearing

It is precisely at a presentence hearing which would determine the existence or nonexistence of a controverted fact in the presentence report that a protracted hearing should be held.[101] Since the fact in issue will be used by the trial judge in determining sentence, it is unfair to decide such an important factual issue in anything less than a full evidentiary hearing with the formal submission of evidence subject to the normal rules of evidence and the rights of the defendant to subpoena and present witnesses and confront those who have asserted the fact in issue. Surely the determination of sentence is as crucial to a criminal defendant as is the determination of his guilt or innocence. Due process requires that a defendant enjoy a full and fair opportunity to ensure the factual accuracy of the information used to determine his sentence by extending to the defendant those same traditional means used to resolve factual issues. As Professor Richard Lehrich has pointed out:

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99. 495 F.2d at 310.

100. The Advisory Committee, which proposed amended Rule 32 to the United States Supreme Court, felt that sentencing procedures, despite their function of providing accurate sentencing information, could be conducted informally without subjecting the probation officer to any rigorous examination by defense counsel or even placing him under oath. *See* Advisory Committee Note to Proposed Amendments, *supra* note 8, at 325.

101. A.B.A. STANDARDS, *supra* note 6, at 254.

> Basic fairness to the accused would seem to require the same opportunity to rebut evidence against him at sentencing as at trial. The stakes at sentencing may be just as high, and the justification for nondisclosure no more, than at the time of guilt determination. Why should the right of confrontation, so "zealously" protected by the Supreme Court in recent years, not be applied to the sentencing process?[102]

In deference to the demands of fundamental fairness, both the Model Sentencing Act[103] and the American Bar Association Standards[104] propose a presentencing hearing to determine any factual issues raised by the presentence report where the defendant enjoys the rights of confrontation and cross-examination. In addition, a majority of American states by legislative enactment or judicial decision now provide for mandatory disclosure of the presentence investigation report or its informational contents, with protection for confidential sources or diagnostic portions of the report.[105] This is a strong indication of the critical nature of this information in determining sentence. It is only fair to the defendant that such information be accurately established.

In other similar fact-determining proceedings, the Supreme Court has held that due process requires that the defendant be afforded the right to present witnesses and documentary evidence and the right to confront and cross-examine the witnesses. In two recent cases, *Morrissey v. Brewer*[106] and *Gagnon v. Scarpelli*,[107] the Court found that

102. Lehrich, *supra* note 2, at 251-52.

103. MODEL SENTENCING ACT, *supra* note 10, § 10.

104. A.B.A. STANDARDS, *supra* note 6, § 5.4

105. ALASKA STAT. § 12.55.075 (Cum. Supp. 1974); ARIZ. R. CRIM. P. 26.6 (1973); State v. Pierce, 108 Ariz. 174, 494 P.2d 696 (1972); CAL. PENAL CODE §§ 1203, 1203.03 (West Cum. Supp. 1974); COLO. REV. STAT. ANN. § 16-11-102 (Cum. Supp. 1973), COLO. R. CRIM. P. 32(a)(2) (1974); CONN. GEN. STAT. REV. § 54-109a (Cum. Supp. 1975); FLA. R. CRIM. P. 3.713 (Cum. Supp. 1974); State v. Rolfe, 97 Idaho 467, 444 P.2d 428 (1968); ILL. ANN. STAT. ch. 38, § 1005-3-4 (Smith-Hurd 1973); IND. ANN. STAT. § 35-8-1A-13 (Burns 1975); KAN. STAT. ANN. § 21-4605 (1974); MAINE R. CRIM. P. 32(c)(2) (1974 Supp.); MD. ANN. CODE art. 41, § 124(b) (Cum. Supp. 1974), Haynes v. State, 19 Md. App. 428, 311 A.2d 822 (1973); People v. McFarlin, 389 Mich. 557, 208 N.W.2d 504 (1973); MINN. STAT. ANN. § 609.115 (1964), MINN. R. CRIM. P. 27.02 (1975); Kuhl v. District Court, 139 Mont. 536, 366 P.2d 347 (1961); NEV. REV. STAT. § 176.156 (1973); N.J.R. CRIM. P. 3:21-2, 3:21-3 (1972), State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969); State v. Pope, 257 N.C. 326, 126 S.E.2d 126 (1962) N.D.R. CRIM. P. 32(c)(3) (1974); OKLA. STAT. ANN. tit. 22, § 982 (Cum. Supp. 1974); ORE. REV. STAT. § 137.079 (1973); PA. R. CRIM. P. 1404 (1975), Commonwealth v. Phelps, 450 Pa. 597, 301 A.2d 678 (1973); VT. R. CRIM. P. 32(c)(3) (1974); VA. CODE ANN. §§ 19.2-229, 53-278.1 (Supp. 1975), Linton v. Commonwealth, 192 Va. 437, 65 S.E.2d 534 (1951); WASH. SUPER. CT. CRIM. R. 7.2(c) (Supp. 1974); WIS. STAT. ANN. § 972.15 (1971); WYO. R. CRIM. P. 32(c)(2) (Supp. 1975).

106. 408 U.S. 471 (1972). Note, however, the right to confrontation and cross-examination in parole and probation revocation hearings is subject to limitation if the hearing officer specifically finds good cause for not allowing confrontation. *Id.* at 489.

107. 411 U.S. 778 (1973).

due process compelled the recognition of these rights in parole and probation revocation proceedings. The rationale behind *Morrissey* and *Gagnon* was that even though parole or probation revocation were not parts of a criminal prosecution, the loss of liberty entailed was a serious deprivation requiring that the defendant be accorded due process protections.

Surely the criminal defendant at sentencing faces the same, if not more serious, potential deprivation of liberty. To ensure the accuracy of sentencing information the convicted defendant must be afforded an adequate opportunity to challenge the facts upon which his sentence is predicated. This can only be accomplished by extending to him the right to present witnesses and documentary evidence in his own behalf and the right of confrontation and cross-examination. The Court has repeatedly recognized that these rights are essential to any fair fact-finding determination which affords the defendant due process of law.

Conclusion

Amended Rule 32 is a laudable step in the direction of providing due process at sentencing. Congress should extend its reform of Rule 32 to clearly define the procedure for resolving any factual determinations made necessary by controverted presentence report allegations. Congress should recognize the convicted defendant's due process right, not only to disclosure of the factual information upon which his sentence is based, but also to a full and fair opportunity to challenge any information in the presentence report which he feels to be inaccurate. The defendant's exercise of his right to present witnesses and his right to confrontation and cross-examination is a prerequisite to accurate information necessary to a proper determination of sentence.